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IN THE

SUPREME COURT OF THE UNITED STATES

JULY TERM, 1973

No. 73-172

JOHN R. FOWLER and JAMES S. GREEN,
Petitioners,

v.

THE STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Court of Appeals of Georgia.

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To the Court of Appeals of Georgia

The petitioners, John R. Fowler and James S. Green, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals of Georgia entered in this proceeding on February 21, 1973. A subsequent petition for Writ of Certiorari to the Supreme Court of Georgia was denied on April 25, 1973.

CITATION OF OPINION BELOW

The opinion of the Court of Appeals of Georgia, reported at 128 Ga. App. 501, appears in the appendix hereto, along with the testimony taken at the suppression hearing, and the affidavit in support of the search warrant and the search warrant.

JURISDICTION

The judgment of the Court of Appeals of Georgia was entered on February 21, 1973. A timely petition for Certiorari to the Supreme Court of Georgia was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an affidavit in support of a search warrant based exclusively upon information received from an informant satisfies the requirement of probable cause where the affidavit states no underlying circumstances showing the basis of the conclusions reached by the informant.

2. Whether an affidavit in support of a search warrant that is insufficient on its face to establish probable cause may be made sufficient through testimony of the magistrate at the suppression hearing that additional facts were orally presented to the magistrate at the time of the warrant application, where such facts were neither recorded nor made a part of the affidavit.

3. Whether an affidavit, whose validity depends upon oral testimony at the suppression hearing in order to establish the underlying circumstances showing the basis of the conclusions reached by the informant, may be attacked on the grounds that the recital in the affidavit that the informant had in the past given reliable information was controverted by testimony at the same hearing.

4. Whether an affidavit in support of a search warrant which omits to specify the time when the facts relied upon occurred is insufficient to establish probable cause.

5. Whether a "John Doe" search warrant which expressly confers upon the executing officer the authority "to search forthwith the person and premises named for

the property specified" is invalid in that it invests in the executing officer discretion as to whom he may search.

6. Whether the affiant has the authority under the applicable State Law to make an application for a search warrant in his official capacity as investigator for a college security department when he is also a deputy sheriff for a county different than that in which the search occurred and at no time acts as a deputy sheriff.

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

"The right of the people to be secure in their persons, homes, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Ga. Code § 32-168. "Authority of campus policemen and other security personnel to make arrests on university property.—The campus policemen and other security personnel of the University System of Georgia shall have the power to make arrests for offenses committed upon any property under the jurisdiction of the Board of Regents of the University System of Georgia."

Ga. Code § 27-314: "A search warrant may be issued only upon the application of an officer of the State or its political subdivisions charged with the duty of enforcing the criminal laws. It shall not be issued upon the application of a private citizen or for his aid in the enforcement of personal, civil or property rights."

Federal Rules of Criminal Procedure, Rule 41(c): "... Before ruling on a request for a warrant the Federal magistrate or state judge may require the affiant to appear

personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made a part of the affidavit. . . ."

Georgia Code § 79A-9917: As Amended, particulary Ga. Laws 1973, P. 688: "Notwithstanding any law to the contrary, any person who is charged with possession of marijuana, which possession is of one ounce or less, and such person would have qualified for the conditional discharge provided for herein but for the fact that the judge chose not to avail himself of the authority granted by this Section or that the person violated the conditions imposed by the court, shall be guilty of a misdemeanor and punished by imprisonment for a period not to exceed twelve months or a fine not to exceed $1,000, or both. Subsequent offenses shall be punished as provided by law."

STATEMENT OF THE CASE

Petitioners, John R. Fowler and James S. Green, students at the West Georgia College in Carrollton, Georgia, Carroll County, were arrested in Room 124, Pritchard Hall, at about 1:10 A.M. on September 25, 1972, upon the basis of a search warrant issued at 12:30 A.M. on the same date, and were later indicted and tried for a violation of the Georgia Drug Abuse Control Act. The affidavit for the search warrant was signed by James T. Hallman, Investigator, West Georgia College Police, and was sworn to before J. W. Martin, Justice of the Peace.

An examination of the affidavit in question reveals that the person to be searched is "John Doe" and the search warrant recites that the person to be searched is "John Doe". At no time was any effort made to insert either names of Petitioners, notwithstanding that both Petitioners were students at the college and notwithstanding that Petitioners were assigned to their room by the College.

At the hearing on the Motion to Suppress, Mr. Hallman, the affiant, stated that he knew that two students lived in Room 124, Pritchard Hall and that in response to the question "You didn't make any attempt to put any alias, or anything other than just a blank John Doe Warrant?" the witness answered, "No, sir, I did not." On the same page of the record, the affiant stated that he furnished "orally" only the first name of the one person.

The same witness, while being questioned about the "reliable information received from an unnamed informant" admitted that no arrest or conviction on a drug charge had resulted from information received from the unidentified informant. The witness stated that he had received information from the informant on only one prior occasion and the witness was not sure as to whether a conviction had resulted therefrom.

Justice of the Peace Martin, who issued the search warrant, testified at the suppression hearing that he knew Mr. Hallman; that Mr. Hallman gave the information under oath, that he was not given the name of any person to be inserted in the search warrant; that he issued the search warrant with the name "John Doe" for the person to be searched; and that the affiant had testified three arrests had been made as a result of information received by the affiant from the informant but that no information had been given about convictions. Justice of the Peace Martin further testified that no time factor was specified as to how or when the previous information had been given to the affiant by the informant.

The trial court overruled the Motion to Suppress on October 12, 1972, after which the Petitioners were tried in the Superior Court of Carroll County, Georgia, by a jury and were found guilty. The jury fixed punishment at thirty (30) days in the penitentiary along with a fine of Eight Hundred ($800.00) Dollars on October 16, 1972, and

recommended misdemeanor punishment. This recommendation was accepted by the trial Court. On the same date, October 16, 1972, Petitioners filed their Motion for New Trial, later dismissed, and a Notice of Appeal.

After conviction and the imposition of the sentence by the Court, both Petitioners were incarcerated in the Carroll County jail from October 16, 1972 until they were released on bond pursuant to an Order of the Supreme Court of Georgia dated October 23, 1972. The order granting supersedeas was subsequently vacated on December 19, 1972 after a rehearing.

The conviction of Petitioners was subsequently affirmed by the Court of Appeals of the State of Georgia on February 21, 1973, and a petition for Writ of Certiorari to the Supreme Court of Georgia was denied on April 25, 1973.

REASONS FOR GRANTING THE WRIT

1. The decision below is in direct conflict with decisions of the Supreme Court of the United States as to scope of the Fourth Amendment prohibition against unreasonable searches and seizures.

2. Clarification is needed as to the standard for establishing probable cause through information supplied by an informant as a result of the continued erosion of the **Aguilar** test.

Amendment IV to the United States Constitution provides,

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." In order to implement the rights guaranteed under the Constitution, the Supreme Court has found it necessary to adopt an exclusionary rule prohibiting the admission of evidence obtained in violation of the Constitution in a criminal prosecution. The exclusionary rule was first used to safeguard Fourth Amendment Rights in **Weeks v. United States**, 232 US 383, 58 L ed 652, 34 S Ct. 341 (1914). In **Weeks**, the Supreme Court held that any evidence obtained by Federal officers in violation of the Fourth Amendment would be barred from a Federal prosecution. The Court concluded: "The efforts of the Courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." **Weeks**, 232 US 383, 393.

It was not until 1961, however, that the Supreme Court applied the exclusionary rule to state prosecutions. In that year, the Court overruled its previous decision of **Wolf v. Colorado**, 338 US 25, 93 L ed 1782, 69 S Ct 1359 (1949), by holding that evidence obtained in violation of the Fourth Amendment was inadmissible in a State Court. **Mapp v. Ohio**, 367 US 643, 6 L ed 2d 1081, 81 S Ct. 1684 (1961).

In **Mapp**, the Court held that the exclusionary rule was an essential element of the right to privacy guaranteed under the Fourth Amendment and as such was the appropriate sanction to enforce this right, as against the States as well as the Federal Government. "To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment." **Mapp**, 367 US 643, 656. The Court recognized that the exclusionary rule serves dual purposes; the deterrence of constitutional violations by eliminating the prosecutorial benefits of such violations and the "imperative of judicial integrity. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." **Mapp**, 367 US 643, 659.

To its proscription against "unreasonable searches and seizures," the Fourth Amendment provides the corollary that "no warrants shall issue, but upon probable cause." Thus, a valid warrant may be issued only upon an affidavit or complaint setting forth sufficient facts to establish probable cause. Since the thrust of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials," **Camara v. Municipal Court**, 387 US 523, 528, 18 L ed 2d 930, 87 S Ct 1727 (1967), the requirement of probable cause serves as the scale on which the competing interests of the individual desirous of privacy and the sovereign

desirous of maintaining order through enforcement of its criminal sanctions are balanced. As was stated by the Supreme Court in **Berger v. New York**, 388 US 41, 55, 18 L ed 2d 1040, 87 S Ct 1873 (1967): "The purpose of the probable cause requirement of the Fourth Amendment [is] to keep the State out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed." Since the balancing of the competing interests is necessarily a delicate task, the standard as to determining probable cause is flexible: "If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient," **Carroll v. United States**, 267 US 132, 69 L ed 543, 45 S Ct 280 (1924).

The question as to when probable cause may be established upon the basis of information from an informant, which is the question presented in this petition, has been decided by the Supreme Court in **Aguilar v. Texas**, 378 US 108, 12 L ed 2d 723, 84 S Ct. 1509 (1964).

Because of the inherent untrustworthiness of informants, the Court saw a need to set a more definite standard in the determination of probable cause. The Court held that where probable cause is to be based solely upon the informant's information, "the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were and some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable'." **Aguilar**, 378 US 108, 114.

In **Aguilar**, the affidavit in support of the search warrant read as follows: "Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbituates, and other narcotics and

narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." **Aguilar**, 378 US 108, 109. In the instant petition, the affidavit is remarkably similar to that in **Aguilar**: "Information received from and [sic] Informant who has in the past given reliable information that in Room 124, Pritchard Hall, West Ga. College, Carrollton, Georgia there is being concealed marijuana and other dangerous and prohibited drugs." An examination of the affidavits reveals only two basic differences: 1) the affidavit in **Aguilar** specifies drugs of a more dangerous character (besides marijuana, heroin and barbituates are included); and 2) the affidavit in this petition alleges that the informant "has in the past given reliable information."

In **Aguilar**, the Supreme Court had little trouble in finding that the affidavit was insufficient to establish probable cause to issue the search warrant. The Court cited with approval the following statement from **Nathanson v. United States**, 290 US 41, 47, 78 L ed 159, 54 S Ct 11 (1933) (indeed, adding the following emphasis): "Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from **facts or circumstances** presented to him under oath or affirmation. Mere affirmance of mere belief or suspicion is not enough." **Aguilar**, 378 US 108, 112. The scope of judicial review of the magistrate's finding of probable cause was stated by the Court to be as follows: "Although the reviewing court will pay substantial deference to judicial determinations of probable cause, the court must still insist that the magistrate perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." **Aguilar**, 278 US 108, 111. The Court then found the affidavit to be defective as to both aspects of the test: it failed to reveal the underlying circumstances showing reason to believe that the informant

was "credible" or his information "reliable" and it failed to reveal the underlying circumstances showing the basis of the conclusions reached by the informant. "Here the 'mere conclusion' that petitioner possessed narcotics was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only 'contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein,' it does not even contain an 'affirmative allegation' that the affiants unidentified source spoke with personal knowledge. For all that appears the source here merely suspected, believed or concluded that there were narcotics in petitioners possession. The magistrate here certainly could not judge for himself the persuasiveness of the facts relied on . . . to show probable cause. He necessarily accepted 'without question' the informants 'suspicion' 'belief', or 'mere conclusion'." **Aguilar**, 398 US 108, 113-14.

According to the reasoning of the Court in **Aguilar**, the affidavit in the instant petition should also be found defective. Clearly, the affidavit fails to meet one of the criteria in that it specifies none of the "underlying circumstances, from which the informant concluded that the narcotics were where he claimed they were." Although failure to meet this test alone is sufficient to render the search warrant invalid, the affidavit should also be found defective as to the other criterion. **McCray v. Illinois**, 386 US 300, 18 L ed 2d 62, 87 S Ct 1056, reh den 386 US 1042, 18 L ed 2d 616, 87 S Ct 1474 (1967), provides an illustration of the specificity needed to satisfy the requirement that the warrant application reveal the underlying circumstances showing reason to believe that the informant was "credible or his information reliable." Because **McCray** dealt with a warrantless arrest, the requisite probable cause had to be established through the testimony of the arresting officers at the suppression hearing. At the hearing one officer testified "that he had been acquainted with the

informant for approximately a year, that during this period the informant had supplied him with information about narcotics activities **'fifteen, sixteen times at least,'** that the information had proved to be accurate and had resulted in numerous arrests **and convictions."** **McCray**, 386 US 300, 303. (emphasis added.) The testimony of the other officer was even stronger: "he had known the informant 'roughly two years', that the informant had given him information concerning narcotics **'20 or 25 times'**, and that the information **had resulted in convictions."** **McCray**, 386 US 300, 304 (emphasis added). Since the warrantless arrest in **McCray** was upheld by the Court, it does not prescribe the minimum standard for establishing the credibility of the informant or the reliability of his information, yet the underlying circumstances confronting the officers as to the informant's reliability is of such greater magnitude and so far more convincing than the bald, conclusory assertions in the petition that the informant "has in the past given reliable information" so as to almost necessarily obviate a finding of probable cause as to this criterion also. Indeed the simple addition of the incantation "was in the past given reliable information" to the proscribed **Aguilar** affidavit in no way renders the affidavit any less conclusory or any closer to providing the magistrate with tangible "facts or circumstances" so as to allow him to perform his "neutral and detached function" of determining whether probable cause exists . : . Thus, it is submitted that the affidavit in the instant petition fails to meet either requirement of the **Aguilar** test so that the search warrant issued pursuant to the affidavit is clearly invalid.

Although the affidavit here presented is clearly insufficient on its face to establish probable cause, the dissenters in **Aguilar** suggest that a defective affidavit might be cured by oral testimony at the time the warrant was sought. The Supreme Court has not directly dealt with this question in regard to state proceedings (although it might be con-

sidered that the majority in **Aguilar** tacitly rejected such a suggestion by virtue of its holding). Since one of the main functions of the warrant process is to provide a before-the-fact record of the facts upon which probable cause is based, oral testimony taken at the time the warrant is sought should be admissible only where it was incorporated within the affidavit. To admit unrecorded oral testimony into evidence at the suppression hearing as to what was brought to the magistrate's attention at the time the warrant was sought is condoning if not encouraging perjury on the part of the affiant and magistrate as an after-the-fact attempt to justify their perpetration of an unconstitutional act. The Supreme Court apparently is cognizant of this potential evil in its promulgation of the Federal Rules of Criminal Procedure. Rule 41 (c) as amended April 24, 1972 provides in part, "Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witness he may produce, **provided that such proceeding shall be taken down by a court reporter or recording equipment and made a part of the affidavit**" (emphasis added). Although it may be argued that this rule is a mere exercise of the Supreme Court's supervisory power over the lower federal courts and is such is not a constitutional mandate, the opposite view is more consistent with the purpose of probable cause in effectuating the individual's constitutionally protected right to privacy. In the same view, the Court has stated: "Of course, the discoveries of an illegal search cannot be used to validate the probable cause judgment upon which the legality of the search depends." **Whiteley v. Warden of Wyoming State Penitentiary**, 401 US 560, 564, 28 L ed 2d 306, 91 S Ct 1031 (1971). Thus, the attempted after-the-fact justification of the issuance of the search warrant in the instant petition should not be allowed by the Court since the additional "facts" were not included in the affidavit.

However, assuming arguendo that the Court holds that a defective affidavit may be cured by oral testimony at the suppression hearing which is not a part of the affidavit, it is submitted that the oral testimony does not sufficiently cure the affidavit so as to establish probable cause in this case. Although the testimony at the suppression hearing to the effect that the informant "had in the past three days seen marijuana" used in the room subsequently searched, which fact was supposedly conveyed to Justice of the Peace Martin, may if believed be sufficient to establish the underlying circumstances showing the basis of the conclusion reached by the informant, the other criterion in **Aguilar** remains unsatisfied.

As was previously discussed, the Court in **McCray v. Illinois** held that the test as to the credibility of the informant may be met by the indication that he has provided information previously which upon investigation has proven to be correct (i.e. numerous occasions when the informant had previously supplied narcotics-related information, which then resulted in numerous arrests and convictions). In the case here presented, however, the affiant upon persistent cross-examination at the suppression hearing finally admitted that he had received information from the informant on only one prior occasion and that no conviction on a drug charge had resulted therefrom. Thus, Justice of the Peace Martin could not possibly have fulfilled his function as a "neutral and detached magistrate" making the determination as to probable cause apart from "those engaged in the competitive enterprise of ferreting out crime." Indeed, Justice of the Peace Martin, in his conduct in issuing the search warrant was the ultimate "rubber stamp for the police" condemned by the Court in **Aguilar**. Not only did Justice Martin refuse to ascertain the identities of the students inhabiting the dormitory room, he actually prevented the affiant from naming the students, stating that "there was no point putting that in

the warrant". Further, he refused to ascertain whether the arrests mentioned by the affiant as resulting from information supplied by the informant had led to convictions, where the arrests had been made, or the time the arrests took place. He seemed to have the preconceived notion that probable cause was established once the magic phrase "information received from an informant who has in the past given reliable information" was recited. As the Supreme Court has stated time and time again, the "probable-cause requirements before a warrant for either arrest or search can issue require that the judicial officer issuing such a warrant be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant." **Whiteley v. Warden of Wyoming State Penitentiary**, 401 US 560, 564, 28 L ed 2d 306, 91 S Ct 1031 (1971). Yet in spite of this command, Justice of the Peace Martin completely abdicated his position of responsibility, functioning as a mere amanuensis for Investigator Hallman. Because of the great societal interest in the right to privacy, a magistrate must not be allowed to pay lip-service to a constitutional requirement in derogation of the right. If the "imperative of judicial integrity" is to be realized, the conduct of Justice of the Peace Martin cannot be condoned.

A further reason for finding the affidavit defective in its complete omission of any statement as to the time when the facts relied upon occurred. The Supreme Court has stated, ". . ., it is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time." **Sgro v. United States**, 287 US 206, 210, 77 L ed 260, 53 S Ct 138 (1932). Thus, the rule has developed that "an affidavit which omits altogether to state the time of the occurrence of the facts relied upon has been held insufficient to show probable cause for the issuance of a search warrant." 100 ALR 2d 525, 527 § 3 (collecting cases). The

reason behind this rule is obvious. "Two conclusions necessary to the issuance of the [search] warrant must be supported by substantial evidence: that the items sought are in fact seizable by virtue of being connected with criminal activity, and that the items will be found in the place to be searched." Comment, 28 U.Chi.L. Rev. 664, 687 (1961). As time passes, the chances increase that the items have since been removed from the place to be searched. For this reason, then, an affidavit must contain a statement as to the time when the facts occurred. Yet, the affidavit in the instant petition fails to make any mention of the time when the facts relied upon occurred. The prosecution attempted to rectify this error by adducing testimony at the suppression hearing from the magistrate that the affiant had told him that he (the affiant) had been given the information on "the previous day". However, since this time factor was not specified in the affidavit, it should not be considered in determining whether there was probable cause to issue the search warrant because of the previously discussed possibility of fabrication.

The Supreme Court in 1967 developed a balancing test as to the determination of probable cause to issue a search warrant in holding that administrative inspectors of residential and commercial premises are subject to a different (and less stringent) standard of probable cause than are other searches. **Camara v. Municipal Court**, 387 US 523, 18 L ed 2d 930, 87 S Ct 1727 (1967). "In cases in which the Fourth Amendment requires that a warrant to search be obtained, 'probable cause' is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness. To apply this standard, it is obviously necessary first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen." **Camara**, 387 US 523, 534. The Court concluded that ". . . there can be no ready test for determining rea-

sonableness other than by balancing the need to search against the invasion which the search entails." **Camara**, 387 US 523, 536.

The application of this balancing test to the case presented in the instant petition magnifies the glaring insufficiency of the affidavit. The fact that the warrant was a "John Doe" warrant is insufficient alone to negate a finding of probable cause where scrutinized against the test enunciated in **Camara**. It is arguable that since the search warrant lists "John Doe" as the person to be searched and expressly confers upon the executing officer the authority "to search forthwith the person and premises named for the property specified," the warrant is invalid in that it invests the executing officer with discretion as to whom he may search. The application of the **Camara** test to the "John Doe" warrant, however, provides an ever clearer illustration of the warrant's inadequacy. Obviously, the less specific a warrant is in its particular description of the place or person to be searched, the more it becomes by its terms a general warrant proscribed by the Fourth Amendment. The closer it becomes to a general warrant, the greater is the resultant invasion of privacy with its concomitant greater necessity or justification for the search.

In the case here presented, the failure to specify the occupants of the room increased the invasion of the Petitioners privacy, particularly, in light of the ease in which their identities could have been ascertained prior to the issuance of the warrant. Since the Petitioners were students assigned to a particular room in a dormitory according to a roster drawn up by the college, and since the affiant was a campus security officer, it would have been relatively easy for the affiant to have looked up the names of the Petitioners. Thus, the high degree of the invasion of privacy mandates a greater justification or necessity for the search according to the **Camara** test. Yet the

requisite necessity to offset the tremendous invasion of privacy resulting from the total inadequacy of both the affidavit and the search warrant does not seem to be present in this case. There is even less justification for the search in this case than the Court was confronted with in the **Aguilar** case. While the affidavit in this petition listed marijuana as the contraband to be seized, marijuana, in fact, being seized in the ensuing search, the affidavit in **Aguilar** listed heroin as the contraband, heroin in fact being seized in the search. Although both heroin and marijuana are considered to be narcotics under the law, clearly heroin is viewed as the greater evil not only by society in general, but by the law itself. Illustrative of the greater leniency accorded to users of marijuana as opposed to heroin addicts is the following provision in the Georgia Code, § 79A-9917: "Notwithstanding any law to the contrary, any person who is charged with possession of marijuana, which possession is of one ounce or less, and such person would have qualified for the conditional discharge provided for herein but for the fact that the judge chose not to avail himself of the authority granted by this Section or that the person violated the conditions imposed by the court, shall be guilty of a misdemeanor and punished by imprisonment for a period not to exceed twelve months or a fine not to exceed $1,000., or both. Subsequent offenses shall be punished as provided by law." Because marijuana presents less of a danger to society than does heroin, the need to search for it is not as great as the need to search for heroin. Thus, the relatively small necessity for the search balanced against the great invasion of privacy suffered by Petitioners in this case, requires a finding of lack of probable cause to issue the warrant.

In addition to **Camara**, certain other recent decisions of the Supreme Court have seemingly narrowed the scope of the **Aguilar** decision, perhaps indicating an increasing suspicion as to the efficacy of the exclusionary rule. However,

each decision, although an exception to **Aguilar**, only serves to emphasize the total lack of probable cause presented in the instant petition by further delimiting the probable-cause concept as related to information supplied by informants. **Spinelli v. United States**, 393 US 410, 21 L ed 2d 637, 89 S Ct 584 (1969), provided one breaking point from **Aguilar**.

Although the Court held the affidavit insufficient to establish probable cause in **Spinelli**, it indicated that other considerations besides those enumerated in **Aguilar** might enter into the determination of probable cause. "The informers report must first be measured against **Aguilar's** standards so that its probative value can be assessed. If the tip is found inadequate under **Aguilar**, the other allegations which corroborate the information contained in the hearsay report should then be considered . . . A magistrate cannot be said to have properly discharged his constitutional duty if he relies on an informers tip which even when partially corroborated is not as reliable as one which passes **Aguilar's** requirements when standing alone." **Spinelli v. United States**, 393 US 410, 415. The **Spinelli** reasoning was further developed by the Court in **United States v. Harris**, 403 US 573, 29 L ed 2d 723, 91 S Ct 2075 (1971), which held that evidence of an unidentified informant's prior credibility was not necessary in order to establish probable cause for the issuance of a search warrant. Although there was no corroboration of the informant's "tip" in **Harris**, the "tip" was found credible on these grounds: 1) the report recounts the informer's alleged recent observations of criminal activity and contains a rather detailed description of the premises on which the criminal activity was occurring; 2) The investigator's affidavit asserts **Harris'** reputation as a bootlegger and the investigator's personal knowledge that liquor had been previously found in an abandoned house under "Harris' control"; and 3) the informer was, by supplying the information, admitting his own participation in a crime. Because the Court rendered its decision in a three-part opinion, the division of the jus-

tices so that no part of the opinion had the support of a majority renders a determination of the precise holding of the Court fruitless. For this reason, **Harris** should be limited to its own specific fact situation. Obviously, the situation presented in the instant petition does not fall within the scope of the **Spinelli** and **Harris** decisions for there is nothing in either the affidavit or the testimony at the suppression hearing that could serve as corroboration of the defective "tip".

Although the Supreme Court will generally accept as binding upon it the State Court's decision as to State law, **Murdock v. Memphis**, 20 Wall 590, 22 L ed 429 (1875), an exception is made where protection of a federal constitutional right would be thwarted if the State had the last word on state questions, **Indiana ex rel Anderson v. Brand**, 303 US 95, 82 L ed 685, 58 S Ct 443 (1938). A further ground for granting the Writ of Certiorari, then, is the arbitrary application of certain state statutes by the Court of Appeals so as to rationalize the issuance of the affidavit by a campus investigator in derogation of Petitioners' rights guaranteed by the Fourth Amendment to the United States Constitution. Ga. Code § 27-314, provides, "A search warrant may be issued only upon application of an officer of the State or its political subdivisions charged with the duty of enforcing the criminal laws. It shall not be issued upon the application of a private citizen or for his aid in the enforcement of personal, civil or property rights." Ga. Code § 32-168, provides, "The campus policemen and other security personnel of the University System of Georgia shall have the power to make arrests for offenses committed upon any property under the jurisdiction of the Board of Regents of the University System of Georgia."

In an analogous situation, the Court of Appeals of Georgia held "In view of the above, we think it is clear that a juvenile probation officer has no authority to apply for a search warrant. . . ." **Huff v. Walker**, 125 Ga. App.

251, 251 (1972). In **Huff**, the Court of Appeals clearly limited applications for a search warrant to an officer of the State or its political subdivisions charged with the duty of enforcing criminal laws. Yet in this case, the Court of Appeals held that Officer Hallman, as a deputy sheriff of Cobb County, was authorized to apply for the search warrant. This decision clearly overlooks the record in this case in that the affidavit clearly shows that it was signed: "James T. Hall, Investigator West Ga. College Police." Beyond question, the affidavit was executed by Hallman as an employee of the West Georgia College Police and not otherwise. This is supported by the language of the search warrant wherein the magistrate stated that the affidavit had been made before him by "James T. Hallman, West G. College Police." There is no evidence in the record that Officer Hallman at any time acted or was carrying out his duties as a deputy sheriff in Cobb County. Thus, Investigator Hallman, as an employee of West Georgia College was not "an officer of the State or its political subdivisions charged with the duty of enforcing the criminal laws" and had no authority to apply for a search warrant. It is submitted that the Court of Appeals, by misconstruing and misapplying the applicable state law, has so thwarted the right to privacy guaranteed to Petitioners by the Constitution so as to justify the granting of this Petition for Writ of Certiorari, in order to set aside the erroneous state ruling.

Finally, the concept of "harmless error" cannot be involved in the case presented by the instant petition. Although it is questionable whether the introduction of unconstitutionally seized evidence can ever constitute harmless error so as not to require reversal, this clearly is not a case requiring the question's determination. The Supreme Court has stated the test as follows: ". . . before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless be-

yond a reasonable doubt." **Chapman v. California**, 386 US 18, 24, 17 L ed 2d 705, 87 S Ct 824 (1967). Further, the Court has stated: "Our judgment must be based on our own reading of the record and on what seems to us to have been the probable impact of the . . . [constitutional error] . . . on the minds of the average jury." and, ". . . constitutional errors affecting the substantial rights of the aggrieved party could not be considered to be harmless." **Harrington v. California**, 395 US 250, 254, 23 L ed 2d 284, 89 S Ct 1726 (1969). Certainly, the erroneous admission of the unconstitutionally seized marijuana had a tremendous "impact on the minds of the . . . jury", and as such affected the "substantial rights" of the Petitioners. Thus, the erroneous admission of the marijuana into evidence necessarily constituted reversible error.

CONCLUSION

For the foregoing reasons, it is respectfully submitted and requested that the Writ of Certiorari be granted and that the decision of the Court of Appeals be reviewed and reversed.

Respectfully submitted

HARRISON & GARNER

By: G. HUGHEL HARRISON
Post Office Box 88
Lawrenceville, Georgia 30245
404-963-3421

APPENDIX A

47894. Fowler et al. v. The State

Bell, Chief Judge.

The defendants were convicted of possession of less than one ounce of marijuana. Their pretrial motion to suppress evidence was denied. The search warrant authorized the search of the person of "John Doe" and the premises described as Room 124, Pritchard Hall, West Georgia College, Carrollton, Georgia. The affidavit to support the warrant issued stated that the affiant had received information from an informant "who has in the past given reliable information that in Room 124, Pritchard Hall, West Ga. College, Carrollton, Georgia, there is being concealed Marijuana and other Dangerous and Prohibited drugs." The affidavit was executed by James T. Hallman, as an investigator, West Georgia College Police. At the motion to suppress hearing, Officer Hallman testified that he was a member of the West Georgia College Police and that at the same time he was also a deputy sheriff of Douglas County, Georgia. The justice of the peace who issued the warrant testified that in addition to the information contained in the affidavit, Officer Hallman gave sworn oral testimony to the effect that the reliable informant had given information in the past that had led to three drug arrests and that the informant had stated to Hallman on the 24th of September, the day previous to the search, that he had seen drugs in this particular room within the past three days. There is also evidence in the record that upon the execution of the warrant the marijuana was found in a bureau drawer in Room 124 of Pritchard Hall. **Held:**

(a) We would have no hesitancy to rule that this warrant was invalid if the search had been limited to the search of the person for no other reason than for lack of

identifying circumstances as to a description of the person to be searched. A John Doe warrant with no other description which would sufficiently permit a prudent officer with a search warrant to be able to locate the person with reasonable certainty is fatally defective. See **Fomby v. State**, 120 Ga. App. 387 (170 SE2d 585), and **Jones v. State**, 126 Ga. App. 841 (192 SE2d 171). However, the evidence shows that the incriminating evidence was found as a result of the search of the premises described in the warrant as opposed to the person. The description of the premises was sufficient for it particularly gave an exact location. Thus the warrant was not a general warrant as it related to the premises searched.

(b) The affidavit upon which the search warrant was based does not cite sufficient facts upon which a determination of probable cause could be made by the issuing magistrate, for it fails to show whether the informant's hearsay was current or stale; fails to establish any basis for the informant's reliability and how he obtained his information. See **Fowler v. State**, 121 Ga. App. 22 (172 SE 2d 447), and **Hornsby v. State**, 124 Ga. App. 724 (185 SE2d 623). However, the information supporting the finding of probable cause may be presented to the magistrate by means of an affidavit or by oral testimony. **Marshall v. State**, 113 Ga. App. 143 (147 SE2d 666). The magistrate testified that he received oral testimony from Officer Hallman that the informant had seen the drugs within this room within about three days from the date of the application of the warrant; that he had furnished information in the past on three occasions that led to drug arrests; and that the informant had personally observed the prohibited matter. Thus, the affidavit and the oral testimony taken together were sufficient to make a showing of probable cause.

(c) Another issue is whether the officer who applied for the warrant was authorized to do so. He testified that he

was a member of the West Georgia College Police Department and also at the same time a deputy sheriff in a neighboring county. Code Ann., §§ 27-303 and 27-314, clearly provide that any officer of the state or its political subdivisions charged with the duty of enforcing the criminal laws may apply for a search warrant. Thus, Officer Hallman was clearly authorized as a deputy sheriff to seek the search warrant. It is therefore unnecessary to decide whether a campus policeman may apply for a search warrant.

Judgment affirmed. Deen and Quillian, JJ., concur.

Argued February 5, 1973—Decided February 21, 1973—Rehearing denied March 14, 1973—Cert. applied for.

Drug violation. Carroll Superior Court. Before Judge Knight.

Harrison & Garner, G. Hughel Harrison, for appellants.

Eldridge W. Fleming, District Attorney, for appellee.

APPENDIX B

In the Superior Court of the Coweta Judicial Circuit
Carroll Superior Court—Carrollton, Georgia

Motion to Suppress

The State

vs.

Sanford Green and John R. Fowler, Defendants

The above styled cause . . . came on Hearing before the Hon. R. Lamar Knight, Judge, and on the 12th day of October 1972, when the following proceedings were had and done:

Appearances

Hon. E. W. Fleming, District Attorney, Coweta Judicial Circuit, Hogansville, Georgia, for the State of Georgia.

Hon. G. Hughel Harrison, of the firm, Harrison & Garner, Lawrenceville, Georgia, for the Defendants.

The Court: All right. The State versus Sanford Green and John R. Fowler, a Motion to Suppress.

Mr. Fleming: Let's see, your Honor. Doc Johnson, and Mr. Hallman, and Mr. Martin.

The Court: Will you gentlemen, please, stand? Do you have any witnesses, Mr. Harrison?

Mr. Harrison: No, sir.

(Whereupon, all witnesses were sworn by Mr. Fleming, the District Attorney.)

The Court: Let the officers go with this Bailiff.

Mr. Fleming: Let Mr. Hallman come up right here, please, sir.

(The Rule was invoked.)

Mr. Harrison: Your Honor, one question about this as a question of law.

The Court: I'll hear from you on the question of law, Mr. Harrison.

Mr. Harrison: It's Code Section 27-303.

(Reading to the Court at this time.)

The Code says, that it must be made by an officer of this State authorized or with the duty of enforcing the criminal law. I submit to the Court that this is a matter of law and that this affidavit is not signed by a proper party.

The Court: I've passed on that matter of law over a period of years.

Mr. Fleming: Have a seat, Mr. Hallman.

HALLMAN, J. T. . . . Witness for the State, having been duly sworn, was examined and testified as follows:

Direct Examination

Q. (Mr. Fleming commencing.) What's your name, sir?
A. James T. Hallman.

Q. Mr. Hallman, you're a security officer, member of the Campus Police out at West Georgia College, Carrollton, Georgia?

A. Yes, Sir.

Q. And, you're also a Deputy Sheriff at Douglas County, Georgia?

A. Yes, Sir.

Q. On the 5th of September 1972, did you call and execute an affidavit to obtain a search warrant for Room 124, Pritchard Hall, West Georgia College?

A. Yes, I did.

Q. Mark this as——

A. I have the original one here.

Q. You have the original. Let me have the original then.

A. Yes, sir. (Handed to Mr. Fleming.)

Q. Thank you.

Now, mark that as the copy, Exhibit "A" for the time being.

(Handed to the Court Reporter to be marked as such for the Record.)

Now, if the Court, please, in questioning him, I'd like to use his photostatic copy and later, I'd like to ask permission to substitute for the original with the photostat.

Mr. Hallman, I show you here a document, Exhibit "A" and ask you if that's not an affidavit you made to Justice Martin?

A. (Looking at document in question.) Yes, sir, it is.

Q. I'll ask you what I refer to, the back of this, which would be page 2 of the affidavit, that you gave, if you had additional facts known to you at the time you made this affidavit, in addition to what is contained in this affidavit?

A. Yes, sir, I did.

Q. I'll ask you to——

Mr. Harrison: For the purpose of the Record——

Q. (Mr. Fleming continuing) ——if you——

The Court: Wait just a minute, Mr. Fleming.

Mr. Harrison: For the purpose of the Record, I object to any testimony, or to any information he might have outside of the four corners of this affidavit. I submit that

when he gave any such information, such information ought to be contained herewith, or at least, the warrant itself should show that in fact that other information was received. The mere fact that he gave him other information, we submit, would be immaterial, because the affidavit speaks for itself, and you should confine it to the four corners of that affidavit.

The Court: Do you have a case to that effect, Mr. Harrison?

Mr. Harrison: No, sir.
And, I cannot find one to the contrary either.

The Court: Objection overruled.

Mr. Fleming: I have several to the contrary.

(Continuing with examination.) Did you have additional information?

A. Yes, sir, I had.

Q. Did you convey that information under oath to Justice Martin?

A. Yes, sir, I did.

Q. What was that information? And, in particular, I direct your attention to, had you received information previously from the informant?

A. Yes, sir. I have had information from a confidential, reliable informant that in the past that had supplied information that had led to arrests on drug charges. This information was given to me at approximately 11:30 P.M., on the 24th of September of this year, stating that my informant had in the past three days seen marijuana and other dangerous drugs used in Room 124, Pritchard Hall, West Georgia College.

Q. He had given you information that led to the arrests of people previously and had you checked that information and found it to be true?

A. Yes, I did.

Q. Did you convey these facts to Justice Martin?

A. Yes, sir, I did.

Q. All right.

Mr. Fleming: You may examine the witness.

The Court: Mr. Harrison.

Cross-Examination

(Mr. Harrison commencing) Mr. Hallman, you're not an officer of Carroll County, Georgia, are you?

A. No, sir, I'm not.

Q. You're employed with the West Georgia College?

A. Yes, sir, that's right.

Q. In that capacity of investigator with the West Georgia College police?

A. Yes, sir.

Q. How long have you been so employed?

A. As an investigator?

Q. Yes, sir.

A. Since the 17th of August.

Q. 17th of August of this year?

A. Yes, sir.

Q. How long have you been actually been on the West Georgia College campus?

A. On the campus?

Q. Yes, sir.

A. Since the spring, March, approximately March 24th of '71.

Q. All right, sir. Now, taking you back to September 24th, how long had the students been in the dormitory?

A. I believe a week.

Q. A week?

A. Approximately longer. I'm not sure about that.

Q. You had access to a roster of the assignments of students to dormitories that were available to you, were they not?

A. I beg your pardon?

Q. I said, did you have access to information to show you what students were enrolled in each room, or assigned to each room in each dormitory?

A. No, sir. At that time, I did not have it twenty-four hours a day, and had it only through the Registrar during the period of office hours approximately from eight to five.

Q. Eight to five?

A. Yes, sir.

Q. Now, the informant that you have stated to us, was it male or female?

Mr. Fleming: I believe the Courts have held that he hasn't got to divulge any information about his informant, your Honor.

The Court: Objection sustained.

Mr. Harrison: Your Honor, I only want to perfect the Record to show that he had declined to make known the name of the informant.

The Court: Yes, I realize that.

Q. (Mr. Harrison continuing with examination) Now, you said that you had received information from this informant within the past three days?

A. Yes, sir.

Q. Now, when was the last conviction that resulted from information received from this informant?

A. I never said a conviction was had as a result.

Q. Had you, in fact, ever had a confession as a result of the information of this informant?

A. I didn't understand you, sir.

Q. Have you as a result of the information obtained from this informant, affected an arrest and the conviction on a drug charge?

A. I have not, no, sir.

Q. Now, do you know of any arrests or conviction that has been obtained from this informant?

A. Yes, sir, I do.

Q. And, what county was that?

A. Cobb County.

Q. How long ago was that?

A. This past spring.

Q. This past spring.

But, you didn't put this information in the affidavit that you gave to Judge Martin, did you, sir?

A. No, sir.

Q. Now, this was last spring?

A. Yes, sir, the spring or early summer.

Q. All right. How many other times have you received such information from this informant?

A. How many other times have I received——

Q. Yes, sir.

A. ——drug information?

Q. Yes, sir.

A. None, sir.

Q. Only one occasion?

A. Yes, sir.

Q. And, that was some six or eight months ago in Cobb County, Georgia?

A. Yes, sir.

Q. And, was there, in fact, a conviction?

A. I'm not sure at this time.

Q. You're not sure?

A. No, sir.

Q. Mr. Hallman, I call your attention that you're under oath and I'll ask you pointedly.

Has there been a conviction from information received from this informant?

A. I do not know.

Q. You can't swear that there has been?

A. No, sir, I can't.

Q. You had no other source of information from this informant?

A. No, sir.

Q. You were present when Judge Martin typed out this affidavit, were you not?

A. Yes, sir, I was there.

Q. Did you, in fact, type it for him?

A. No, sir, I did not.

Q. Where was it executed? Where did you give the affidavit?

A. I'm not familiar with the address. I believe it's 415 Burson. I believe it's Justice of the Peace Martin's residence.

Q. Were you administered an oath?

A. Yes, sir, I was.

Q. Did you get him out of bed?

A. Yes, sir, I believe he was.

Q. Now, the name John Doe that you gave him on here, you didn't attempt to add anything to that, did you, sir?

A. You mean add anything to the names?

Q. Yes, sir.

A. No, sir. At that time, I didn't have the roster available to me to find out who lived in that room.

Q. You knew two students lived in this room, didn't you?

A. Yes, sir, I knew that.

Q. You didn't make any attempt to put any alias, or anything other than just a blank John Doe warrant?

A. No, sir, I did not.

Q. You furnished no information as to ascertain the identity of any person that might be there, did you?

A. Yes, sir, I did say one, naming first name only. That was at Judge Martin's and when I said this name, that he said there was no point putting that in the warrant. I didn't argue with him.

Q. Now, you told, you testified you told Judge Martin about receiving the information that resulted in an arrest, but no conviction.

Did you tell him where that arrest was made?

A. No, sir, I did not.

Q. Did you tell him the time that it was made?

A. No, sir.

Mr. Harrison: I have no further questions.

Mr. Fleming: Come down.

The Court: Go down.

Mr. Fleming: Mr. Martin. Call Mr. Martin.

* * * * * * * *

MARTIN, J. W. Witness for the State, having been duly sworn, was examined and testified as follows:

Direct Examination

Q. (Mr. Fleming commencing) Your name is J. W. Martin?

A. Yes, sir.

Q. You're a Justice of the Peace, sir?

A. Yes, sir.

Q. What District, please, sir?

A. 714.

Q. 714th District?

A. Yes, sir.

Q. And, that's in Carroll County, Georgia?

A. Yes, sir.

Q. Do you know Mr. Hallman, the gentleman that just left the room?

A. Yes, sir.

Q. On the—do you have the original affidavit that was issued in this case?

A. (Looking) Yes, sir.

(Handed to Mr. Fleming.)

Q. All right, sir. (Looking at affidavit in question.) Mark this, please, and we will substitute this for the copy that I previously had.

(Handed to the Court Reporter to be marked as such for the Record.)

Now, I show you a document that's been marked State Exhibit "A", and ask you if that's the affidavit that Mr. Hallman made to you to receive a search warrant?

(Handed to the witness.)

A. (Looking) Yes, sir, it is.

Q. Based on that affidavit, I'll ask you this question here. On Page 2 here, it has certain information. Did he give you that and you put that down?

A. Yes, sir, I did.

Q. I'll ask you, Mr. Martin, did he give you any further information?

A. Yes, sir, he did. We discussed it prior to typing the affidavit out, and he stated, to the best of my recollection, that this reliable informant had given him information in the past that had led to three drug arrests, and that he had given this information, that is the informant, on the 24th of September, the previous day, that he had seen drugs in this particular room within the past three days.

Q. Based on that information and this affidavit, did you issue this warrant here, a document marked State Exhibit "B"?

(Showing to the witness.)

A. (Looking.)
Yes, sir.

Q. Subsequently, was a return made here and signed by J. T. Bailey?

A. Yes, sir.

Mr. Fleming: We offer State's Exhibits "A" and "B", your Honor.

(Handed exhibits to Mr. Harrison.)

Mr. Harrison: Thank you.

(Looking at exhibits in question.) No objection, your Honor.

The Court: Let them be admitted.

Mr. Fleming: That's all.

The Court: Any questions, Mr. Harrison?

Cross-Examination

Q. (Mr. Harrison commencing) Mr. West, Judge West, you went——

A. Martin.

Q. Judge Martin, you went, this happened about midnight?

A. Yes, sir, just past midnight.

Q. Mr. Hallman come to your residence?

A. Yes, sir.

Q. And, you administered an oath to him?

A. Yes, sir.

Q. All of this information that you had received was given under oath?

A. Yes, sir.

Q. And now, Judge Martin, you did not put any of the additional information as to the time, other than what information he gave you down on this affidavit, did he, sir?

A. No, sir, not on the affidavit.

Q. All right, sir. Did he give you the name of any person residing at Room Number 124, Pritchard Hall, West Georgia College?

A. No, sir.

Q. He gave you no names?

A. No, sir.

Q. You issued it on the John Doe blank warrant?

A. Yes, sir.

Q. Judge, did you type this?

A. Yes, sir.

Q. You typed the warrant.

I direct your attention to the back page. Now, did you fix that out yourself?

(Handed document to the witness.)

A. (Looking at document in question.)

The top portion I did, and I wrote the 29th of September —72, and signed it.

Q. All right, sir. Did you change the time factor, the September 25th, 1972, at 12:30 P.M.? Did you write in the P.M. on that warrant?

A. (Looking at warrant in question.)
Yes, sir, I did.

Q. And, that was the time it was issued?

A. That's 12:30 A.M., it should have been.

Q. All right, sir. But, now he gave you the information, Mr. Hallman gave you the information that he had a reliable informant?

A. Yes, sir.

Q. That resulted in three drug arrests?
A. Yes, sir.

Q. Did he say anything about conviction?
A. No, sir.

Q. Did he tell where it had been?
A. No, sir.

Q. Did he tell you how long ago it had been?
A. The drug arrests?

Q. Yes, sir.
A. No, sir.

Mr. Harrison: I have no further questions.

The Court: You may go down.
Call your next witness, Mr. Fleming.

Mr. Fleming: The State rests, your Honor.

The Court: The State rests.
Go ahead for the Defendants, Mr. Harrison.

Mr. Harrison: I believe we have no evidence on behalf of the Defendants, and I ask for the law. It would be sufficient.

The Court: All right, sir. I'll hear from you on your argument.

Mr. Harrison: Your Honor, under Fowler versus the State, 121 Georgia, Page 23, time is of an essence in a search warrant.

(Mr. Harrison now citing above citation to the Court at this time.)

The Court: Mr. Harrison, doesn't that case before you go on any further, doesn't that case say that you're talking about the timing element, that case that you're reading to me, is talking about the time element that the informant

said he saw the drugs in this house that you're talking about here.

I think the officers a few minutes ago said, he saw it there within the last three days.

Mr. Harrison: (Responding.) No, sir, it's a two-fold.

The Court: Two-fold, yes, sir. All right.

Mr. Harrison: . . . that the affidavit itself must form the basis to enable the Court, the Judge issuing, to ascertain whether or not there is probable cause.

In Fowler versus the State, is without equivocation in stating that, that in that affidavit there are no qualifications on . . . it just says, without, now let me read this portion of it.

> "After any statement in the affidavit as to the time of the occurrence in question, the magistrate could not make an independent determination as to whether probable cause still existed in the issuance of the search warrant . . ."

(Mr. Harrison continued reading above citation to the Court at this time.)

Now, again, in Fowler versus the State it says, under equivocation that in this affidavit and this warrant that time must be set out. There is no qualification.

Now, your Honor, on the informant thing information. I submit that even with the supplemental information that it's insufficient. Now, Mr. Hallman testified that, at the most, he said that he had given information to the magistrate from this reliable informant.

(Mr. Harrison continued his argument to the Court.)

Now, the case I have in mind here is Burns versus the State, if the Court will like me to go into it.

The Court: If you will give me the citation, I'll read it.

Mr. Harrison: All right, sir. It's 119 Georgia, Page 678, particularly Page 683, your Honor. In this one statement, if the Court will allow me.

The Court: Yes, sir.

Mr. Harrison: All right. "Where the officer relies on an informant he must give sufficient information of underlying circumstances . . ." (Reading to the Court at this time.)

Your Honor, under these authorities, we ask that the Motion be sustained.

Mr. Fleming: (Responding.) Your Honor, I think we've met every requirement. There's one thing that I do want to complete the Record on, however, because there's some question in my mind and ask the Court's permission to complete the Record as to the trial of this case, since it is against two specific people.

As far the warrant is concerned, we have no worry about it, because the warrant is sufficient, together with evidence submitted to the Court.

But, since this evidence is to be used against two specific people, now I would like to put up Doc Johnson and have him, and find out from him whether or not these people did, in fact, operate or occupied that room. I'd like to complete the Record.

Mr. Harrison: We'll stipulate that the two Defendants were the occupants of Room 124.

The Court: Counsel have stated that they will stipulate that they will, were the occupants there.

Mr. Fleming: Of 124 Pritchard Hall, is that the name of it?

Mr. Harrison: Yes.

Mr. Fleming: It is to be stipulated that these two defendants are, were they occupants of Room 124, Pritchard Hall, West Georgia College, Carrollton, Georgia.

Then, that's all we have, your Honor. We need not put him up and we contend that the Motion to Suppress should be overruled.

The Court: Motion to suppress is overruled.

Certificate

State of Georgia
Carroll County

I, Thos. J. Shaheen, do hereby certify that I correctly reported in Stenograph the foregoing Hearing, consisting of testimony and documentary evidence, and proceedings at the place and time stated in the caption hereof, that I later reduced my stenograph notes to typewriting, or under my supervision, and that the foregoing cases numbered one through sixteen (1-16), plus Exhibits "A" and "B", contain a full, true and correct transcript of the testimony documentary evidence and proceedings in said case as therein set out.

I further certify that I am neither of kin nor of counsel to any of the parties involved, nor in any manner interested in the result thereof.

This the 14th day of November 1972.

THOS. J. SHAHEEN
(Court Reporter and Notary Public*)

TJS:ts

*My Notary Public commission expires in May of 1974.

APPENDIX C

AFFIDAVIT FOR SEARCH WARRANT

Justice Court, 714 Dist. G. M.
Court before whom affidavit is made

Georgia, Carroll County

The undersigned being duly sworn deposes and says:

That he (Has reason to believe) that on the person of John Doe and that on the premises known as Room 124, Pritchard Hall, West Ga. College, Carrollton, Ga. there is now being concealed certain property, namely, Marijuana and Other Dangerous and Prohibited Drugs which are in Violation of the Georgia Drug Abuse Act.

And that the facts tending to establish the foregoing grounds for issuance of a search warrant are as follows: Information received from and Informant who has in the past given reliable information that in Room 124, Pritchard Hall, West Ga. College, Carrollton, Ga. there is being concealed Marijuana and Other Dangerous and Prohibited Drugs.

Deponent shows that based on the above foregoing facts and information he has probable cause to believe that the aforesaid property is concealed upon the aforesaid (premises) and is subject to seizure and makes this affidavit so that a search warrany my issue for the aforesaid (premises).

/s/ JAMES T. HALLMAN
(Signature and Title of Officer seeking search warrant)

JAMES T. HALLMAN, Investigator
West Ga. College Police

Sworn to and subscribed before me this 25th day of September, 1972.

/s/ J. W. MARTIN

(Court before whom oath is taken)

J. W. MARTIN
Justice of the Peace
Ex. Off. Dist. 714 G.M.

APPENDIX D

SEARCH WARRANT
City Court of Carrollton

Georgia, Carroll County

To: Chief of Police D. H. Johnson, and any lawfully authorized officer of said County. Carroll

Affidavit having been made before me by James T. Hallman, West Ga. College Police that he (has reason to believe) that on the person of John Doe and that on the premises known as Room 124, Pritchard Hall, West Ga. College, Carrollton, Ga. there is now being concealed certain property, namely, Marijuana and Other Dangerous and Prohibited Drugs which are in Violation of the Georgia Drug Abuse Act and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person and premises above described and that the foregoing grounds for application for issuance of the search warrant exist. You are hereby commanded to search forthwith the person and premises named for the property specified, and making the search (at any time in the day or night) and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

This 25th day of September, 1972 at 12:30 o'clock A.M.

J. W. MARTIN, Judge
J. W. MARTIN
Justice of the Peace
Ex. Off. Dist. 714 G.M.

RETURN

I received the attached search warrant on 9/25, 1972, and have executed it as follows:

On 9/25/72, at 1:10 o'clock A.M., I searched the person and the premises described in the warrant and

I left a copy of the warrant with John R. Fowler together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

One plastic bag containing suspected marijuana

Two packets zig zag wheat straw

One Bufferin bottle containing seven large white pills with capital letter "B" inscribed on each and three smaller yellowish-white pills with straight mark across one side.

One bottle containing fifteen small oblong shaped white pills.

This inventory was made in the presence of John R. Fowler and I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

J. T. BAILEY, Affiant

Subscribed and sworn to and returned before me this ..... day of ....., 19.....

.....

Judge

Important: This Search Warrant Must Be Served Within Ten Days From the Date It Is Issued.

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SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
OCT 11 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

JULY TERM, 1973

NO. 73-172

JOHN R. FOWLER and JAMES S. GREEN,
Petitioners,

versus

STATE OF GEORGIA,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Georgia

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals of Georgia (App. A of Petition) is reported in *Fowler v. State*, 128 Ga. App. 501, ____ S.E.2d ____ (1973).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1.

Whether a probable cause for the issuance of a search warrant can be established by oral testimony sworn by the affiant at the time of the issuing of the warrant in addition to the information appearing on the affidavit?

2.

Whether the "John Doe" warrant authorizing the search of a specific premises is defective?

3.

Whether a campus policeman who is also a deputy sheriff in a neighboring county empowered under state law to make an application for a search warrant to search a dormitory room on the campus on which he is a policeman?

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

"The right of the people to be secure in their persons, homes, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Ga. Code 32-168. "Authority of campus policemen and other security personnel to make arrests on university property.—The campus policemen and other security personnel of the University System of Georgia shall have the power to make arrests for offenses committed upon

any property under the jurisdiction of the Board of Regents of the University System of Georgia."

Ga. Code 27-314: "A search warrant may be issued only upon the application of an officer of the State or its political subdivisions charged with the duty of enforcing the criminal laws. It shall not be issued upon the application of a private citizen or for his aid in the enforcement of personal, civil or property rights."

Federal Rules of Criminal Procedure, Rule 41(c): ". . . Before ruling on a request for a warrant the Federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made a part of the affidavit. . . ."

Georgia Code 79A-9917: As Amended, particularly Ga. Laws 1973, p. 688: "Notwithstanding any law to the contrary, any person who is charged with possession of marijuana, which possession is of one ounce or less, and such person would have qualified for the conditional discharge provided for herein but for the fact that the judge chose not to avail himself of the authority granted by this Section or that the person violated the conditions imposed by the court, shall be guilty of a misdemeanor and punished by imprisonment for a period not to exceed twelve months or a fine not to exceed $1,000, or both. Subsequent offenses shall be punished as provided by law."

STATEMENT OF THE FACTS

The defendants were convicted of possession of less than one ounce of marijuana. Their pretrial motion to

suppress evidence was denied. The search warrant authorized a search of "John Doe" and the premises described as Room 124, Pritchard Hall, West Georgia College, Carrollton, Georgia. The affidavit to support the warrant (App. C of Petition) stated that the affiant had received information from an informant "who in the past has given reliable information that in Room 124, Pritchard Hall, West Ga. College, Carrollton, Ga. there is being concealed Marijuana and other Dangerous and Prohibited Drugs." The affidavit was executed by James T. Hallman, an investigator with the West Georgia Police Force who was at the same time also a Deputy Sheriff of Douglas County, Georgia, a county neighboring the county in which West Georgia College is located. (App. B of Petition, A-5)

At the hearing on the motion to suppress, the magistrate testified that in addition to the information contained in the affidavit, Officer Hallman gave sworn oral testimony to the effect that the reliable informant had given him information in the past that had led to three drug arrests and that the informant had stated to Officer Hallman that on the 24th of September, the previous day, that he had seen drugs in this particular room within the past three days. (App. B of Petition, A-13).

Upon execution of the warrant, the marijuana was found in a bureau drawer in Room 124 of Pritchard Hall.

STATEMENT AND ARGUMENT

Question 1

The petitioners in their petition have presented a scholarly general summary on the law of search and seizure. Nowhere in their petition, however, do they cite any

specific applicable authority that would require this Court to grant the requests of the petition.

It is well established that a request for a search warrant may be based upon hearsay information. *Jones v. United States*, 362 U.S. 214, 83 S.Ct. 73, 9 L.Ed. 2d 88 (1960). It is equally well established that where the affidavit contains hearsay information there must be a showing that the informant is reliable. *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed. 2d 637 (1969). The fact that an informant has given reliable information in the past is an example of showing that he is reliable. *Jones v. United States*, supra; *United States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 13 L.Ed. 2d 684 (1965).

Based on the foregoing authorities, and the facts set out earlier in this brief, there is no question that the magistrate had presented to him sufficient information upon which to find probable cause to issue a search warrant. The question arises as to whether all the information upon which the magistrate's determination of probable cause is based must appear on the face of the affidavit or warrant.

The petitioners claim that this Court's decision in *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1409, 12 L.Ed. 2d 723 (1964), requires a finding that the magistrate in the instant appeal did not have probable cause before him upon which to issue the warrant. Such a claim is without any sound basis.

This Court in *Aguilar* held that the search warrant, issued by a Texas justice of the peace, should not have been issued because the affidavit did not provide a sufficient basis for a finding of probable cause. That opinion

states, however, that if other information than that contained in the affidavit "had been appropriately presented to the magistrate, this would, of course, present an entirely different case." *Aguilar v. Texas*, supra, 378 U.S. at 109. The state and federal constitutions require only that the finding of probable cause be supported by oath or affirmation. The petitioners have cited no case on this question.

We know of no case holding that if information sufficient to uphold a determination of probable cause is presented under oath to a state magistrate, the failure to record the information in the form of an affidavit invalidates the search warrant. As a matter of fact another decision in the Georgia appellate courts upholds the ruling of the decision appealed from by the instant petition. That decision is *Marshall v. State*, 113 Ga. App. 143, 147 S.E. 2d 666 (1966), and it holds that the information supporting the finding of probable cause may be presented by means of an affidavit or by oral testimony. A Fifth Circuit decision in *Dewitt v. United States*, 383 F. 2d 542 (5 Cir., 1967) held that probable cause for the issuance of a search warrant was established by matters set forth in the warrant, supporting affidavit, and *sworn testimony* so that the warrant and subsequent search met the constitutional standards and the evidence obtained in the search was not subject to suppression.

This Court expressly limited its decision in *Aguilar* to the situation where the facts and circumstances shown in the affidavit were the only facts presented to the magistrate. In the instant petition the affiant presented the additional facts under oath at the time of showing probable cause to the magistrate. To grant the requests of this

petition would amount to an extension of the decision in *Aguilar* which is a result that this Court did not care to reach in *United States v. Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed. 2d 723 (1971).

It is clear that there are no controlling federal standards on this question, and in the absence of such standards, the lawfulness of the search is determined by state law. *United States v. Hooper*, 320 F. Supp. 511 (E.D. Tenn, 1969), aff'd 438 F. 2d 968 (6 Cir., 1970), cert. den. 400 U.S. 929, 91 S.Ct. 186, 27 L.Ed. 2d 190 (1970); *United States v. Williams*, 351 F. 2d 475, 477 (6 Cir., 1965).

In *Ker v. California*, 347 U.S. 23, 34, 83 S.Ct. 1623, 10 L.Ed. 2d 726 (1963), this Court said, "the States are not thereby precluded from developing workable rules governing arrests, searches, and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures." In the instant petition we have a situation where the State of Georgia has developed such a workable rule, and therefore the search and seizure here were in compliance with the requirements of the constitution.

The words of this Court in *United States v. Ventresca*, supra, 380 U.S. at 108, are most appropriate. There the Court said:

> "The Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be treated and interpreted by magistrates

> and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst of criminal investigations. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing Courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting."

These principles should be followed and the petitioners' conviction upheld.

Question 2

The petitioners claim that using a "John Doe" warrant rendered the search illegal. This claim also is without any sound basis.

The lower court said that it would have had no hesitancy to rule that the warrant was invalid if the search had been limited to the search of the person for no other reason than for lack of identifying circumstances as to a description of the person to be searched. (App. A of Petition, A-1, 2). The incriminating evidence, however, was found as a result of a search of the premises, and not of a person.

In *United States v. McClard,* 33 F. Supp. 158 (E.D. Ark., 1971), aff'd 462 F. 2d 488 (8 Cir., 1972) it was held that the "John Doe" caption of an affidavit in search warrants did not render them defective where the search was of described premises and for described items rather than of an individual.

Therefore, under the circumstances of the instant petition, the "John Doe" warrant is not illegal.

Question 3

The petitioners claim that Officer Hallman, who is an officer of the West Georgia College Police Department as well as a deputy sheriff in a neighboring county, was not authorized to apply for the search warrant.

Sections 27-303 and 27-3147 of the Georgia Code Annotated clearly provide that any officer of the state or its political subdivisions charged with the duty of enforcing the criminal laws may apply for a search warrant. Under these statutes, Officer Hallman as a deputy sheriff was clearly authorized to apply for the warrant. Based on these statutes, the Court of Appeals of Georgia found it unnecessary to decide the question of whether a campus policeman may apply for a search warrant.

This question obviously involves a state court's decision as to state law. Such decisions are generally accepted by this Court. The petitioners, however, claim that the Georgia appellate court's decision on Georgia law would thwart their protection of a federal constitutional right.

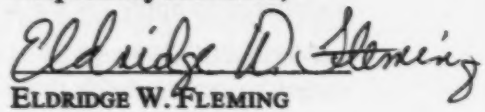
No decision has been cited by the petitioners directly in point in their contention. The only case cited, *Huff v. Walker*, 125 Ga. App. 251, ____ S.E. 2d ____ (1972), is not in point, nor is it analagous, as a reading of that decision will show.

On this question it is obvious that the Georgia appellate court's decision construing Georgia law does not infringe upon the petitioners' protection against unreasonable searches and seizures and that this Court should leave the state appellate court's decision undisturbed. This question is frivilous and should require no further argument.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,



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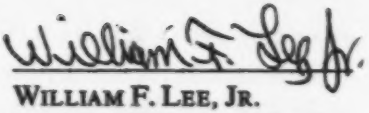

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Brief for Respondent in Opposition upon Mr. G. Hughel Harrison, Harrison & Garner, P. O. Box 88, Lawrenceville, Georgia 30245, Attorney for Petitioners by depositing the same in the United States Mail in a properly addressed envelope with adequate postage affixed thereto to assure delivery.

This the 10th day of October, 1973.

William F. Lee Jr.

Attorney for Respondent